IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2478 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALUBHAI JUTHABHAI DHOLAKIA

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 2478 of 2005

MS SUBHADRA G PATEL for Petitioner No. 1

MR IM PANDYA AGP for Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 04/04/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the order passed against him by District Magistrate,

Bhavnagar District, Bhavnagar, on 19.01.2005 in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as bootlegger from 19.01.2005 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at subjective satisfaction. Firstly, the detaining authority took into consideration nine criminal cases filed against the petitioner for the breach of Bombay Prohibition Act. Secondly, the detaining authority took into consideration four incamera statements as recorded on 10.01.2005 by sponsoring authority as verified by the detaining authority on 16.01.2005. The identity of the witnesses is not disclosed by the detaining authority claiming privilege under Section 9(2) of the PASA Act.

3. All the nine crimes came to be registered against the petitioner before Gariyadhar Police Station on 23.02.2002, 24.05.2002, 01.08.2002, 04.08.2002, 09.01.2003 07.09.2003, 16.11.2003, 27.02.2004 and 12.12.2004. In each case, it was alleged that the petitioner was found in possession of some quantity of prohibited country liquor. The detaining authority considered exhaustively and thoroughly investigation papers in all cases registered against the petitioner and came to the conclusion that the petitioner was a bootlegger within the meaning of PASA Act.

3. Out of four incamera statements, the first witness referred to an incident occurred before 15 days of recording of his statement. When the witness was returning to Gariyadhar on his motor cycle at about 7.00 P.M., he found that the petitioner was standing near Mafatpura in drunken condition. The witness was stopped and told by the petitioner that the petitioner was in need of money and he was apprehended by the police. The petitioner demanded Rs.2,000-00 from the witness. On refusal by the witness, the petitioner got excited and thrown out the witness on the ground from his motor cycle and started beating the witness, though a crowd was gathered, but the petitioner rushed towards the crowd to beat the persons gathered, so the crowd was disbursed. The second witness referred to an incident occurred before 8 days of recording of his statement. The witness was sitting at his house, after taking supper and was approached by the petitioner and his accomplices. The petitioner was told to carry tins of jaggery at Khari river and was offered to pay by double charges for

labour, but the witness denied. Thereupon the petitioner started abusing the witness and started beating him, though the crowd was gathered, but petitioner took out a knife and rushed towards the crowd, so the crowd was disbursed. The witness was threatened to kill by the petitioner. The third witness narrated the incident occurred 12 days before of recording of his statement. The witness was returning to his house, he found that near Mafatpura, the petitioner was selling illegal country liquor and persons were drinking, one of the said persons demanded money from the witness and put his hand in the shirt pocket of the witness. The witness took out hand of said person from his pocket. The petitioner noticed this and excited and started abusing and beating the witness on the pretext that the witness was harassing his customers. The petitioner inflicted 2-3 blows of pipe on the leg of the witness, though a crowd was gathered, but the petitioner rushed towards the crowd along with his accomplices with weapons, so the crowd was disbursed, the petitioner took out an amount of Rs.800-00 from the pocket of the witness and after threatening he was allowed to go. The fourth witness referred to an incident occurred before 10 days of recording of his statement. The witness was going to one cinema to watch picture, and he was approached by the petitioner and was directed that after the picture was over, the witness should bring raw-materials for preparing country liquor in the sim of village Navagam. The witness refused to do this labour work for illegal purpose. The petitioner was excited and started beating the witness, a crowd was gathered, but was disbursed on account of the fear the petitioner. The petitioner, thereafter, took out knife and through the knife tear the pent and shirt of the witness.

4. Relying upon the above materials, the detaining authority came to the conclusion that the petitioner was engaged in storing, selling and transporting the prohibited country liquor and was harassing innocent citizens, who became obstacle in his illegal activities of dealing prohibited liquor. In view of the detaining authority, the bootlegging activities of the petitioner were prejudicial to the maintenance of public order and adversely affecting public health and were required to be prevented forthwith. The detaining authority, after considering other alternative remedies available against the petitioner in general law, came to the conclusion that there was no other alternative, except to detain the petitioner under the PASA Act, as bootlegger. The detaining authority, therefore, passed an order of detention as aforesaid, which is under challenge in this

petition.

5. Learned advocate Ms.S.G.Patel for the petitioner and learned AGP Mr.I.M.Pandya for the respondents were herd at length.

6. Out of various grounds urged on behalf of the petitioner and opposed and controverted by learned AGP, it appears that this petition can be examined and disposed of only on the issue that whether there was credible and cogent material placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed and public health was adversely affected.

7. To reach to the subjective satisfaction that bootlegging activities of the petitioner were prejudicial to the maintenance of public order and public health, the detaining authority must rely upon credible and cogent material indicating that the activities of the detenu directly or indirectly were causing or were likely to cause harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or the public health. While undertaking this exercise, the detaining authority has to draw a clear line between the cases falling within the category of breach of law and order and the cases falling within the category of breach of public order.

8. Referring to the nine criminal cases filed against the petitioner under the Bombay Prohibition Act for the possession of prohibited liquor, and going through the investigation papers as placed on record, it is found that those nine cases came to be filed against the detenu because she was dealing in prohibited liquor. The possession of prohibited liquor is a breach under the Bombay Prohibition Act and hence cases came to be filed. However, merely filing cases under the Bombay Prohibition Act would not result in a conclusion that the activities of the petitioner were disturbing the public order or was affecting adversely to the public health. At the most, the petitioner might have committed breach of the provisions of law, for which the petitioner may be tried and punished if found guilty, but surely the act constituting the offence in dealing in prohibited liquor cannot be said to have affected the even tempo of the life of the community nor the activities revealed through the investigating papers indicate that in the activities alleged through these cases, society at large or section of the society or community or particular community was

involved. Therefore, these cases may be instances of breach of law and order, but cannot be branded as activities disturbing the public order or affecting the public health.

9. Further while referring to the in-camera statements, as recorded by the sponsoring authority and verified by the detaining authority, it must be borne in mind that while reaching to the subjective satisfaction about the alleged activities of the petitioner, it would be necessary for the detaining authority to consider fall out, reach and impact of the activities of the petitioner and thereafter to come to the conclusion that such activities were capable of disturbing the public order. Two incidents, as narrated through in-camera statements, reveal individual disputes than to involve society at large or even disturbing the even tempo of the life of the community. The potentiality of the act alleged through in-camera statements, even from the bare reading of them, are not capable to be branded as to the activities disturbing the even tempo of life of the community or society at large or section of the society. No widespread danger or harm to the society could be inferred from the statements of the witnesses. Therefore, even after taking them on their face value, those incidents, may be instances of disturbing law and order, which can be taken care of by general law and by no stretch of reasoning, such activities can be branded to be disturbing the public order or affecting adversely to the public health.

10. In the matter of ASHOKBHAI JIVRAJ @ JIVABHAI SOLANKI vs. POLICE COMMISSIONER, SURAT and Ors. as reported in 2000 (1) GLH 393, wherein the Division Bench of this Court after considering the decision of the Apex Court, observed in paras 20 and 21 as under :

> "20 The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and Two. Devaki vs. State of Tamil Nadu, AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly in Two. Devaki, panic amongst people in the hall in which the incident took place and in nearby vicinity was highlighted. It was also alleged that people were scared and had run helter-skelter. In spite

of such allegations, the Supreme Court held that they were not cases of maintenance of public order and hence, no action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention, could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again in Mustakmiya Jabbarmiya Shaikh vs. M.M. Mehta, Commissioner of Police and Others, 1995 (2) GLR 1268 (Sc), the Supreme Court considered the relevant decisions on point including the decisions in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases."

11. The present set of facts are squarely covered by the above decision of this Court in the case of Ashokbhai Jivraj @ Jivabhai Solanki (supra) and therefore the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order by the alleged activities of the petitioner cannot be said to be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

12. In the result, the petition is allowed. The order passed by the District Magistrate, Bhavnagar District, Bhavnagar on 19.01.2005, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu Kalubhai Juthabhai Dholakia is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

(vijay)